



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 29, 1995

Mr. Tracy A. Pounders
Assistant City Attorney
City of Dallas
City Hall
Dallas, Texas 75201

OR95-1623

Dear Mr. Pounders:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 33426.

The City of Dallas (the "city") received a request for information relating to the city's cellular telephone service. You have submitted documents designated as Exhibits B and C for our review. You contend that Exhibit B is excepted from required public disclosure under section 552.108 of the Government Code.¹ You also assert that Exhibit C is excepted from required public disclosure under section 552.305 of the Government Code.

¹Exhibit B is a written report regarding the trial use of cellular phones by the Dallas Police Department. We note that the requestor has informed this office by letter dated May 5, 1995, that he is not requesting such information. However, the requestor goes on to explain that he is seeking the same information that the city provided to a reporter for the Dallas Observer. The city does not indicate whether the report was part of the information released to the reporter for the Dallas Observer. Accordingly, we will consider the city's contention that the information is excepted from required public disclosure in this ruling.

However, if Exhibit B or portions thereof were released to a reporter for the Dallas Observer, the city may not withhold any of the information that was released regardless of our determination under section 552.108 of the Government Code. See Gov't Code § 552.007(b); Open Records Decision Nos. 436 (1986), 435 (1986), 412 (1984).

Section 552.108 excepts information from disclosure when the release of the records would unduly interfere with the prevention of crime and the enforcement of the law. Open Records Decision No. 553 (1990) at 4 (and cases cited therein). A governmental body claiming the "law enforcement" exception must reasonably explain how and why release of the requested information would unduly interfere with law enforcement and crime prevention. Open Records Decision No. 434 (1986) at 2-3.

You claim that "release of the report will give the general public information regarding how cellular phones are used by the [Dallas Police Department], information which can be used to hamper the detection, investigation and prosecution of crime." We disagree. Most of the report concerns administrative and statistical information concerning the use of cellular telephones by police department personnel. We have marked the information that contains law enforcement techniques or security information the release of which would unduly interfere with law enforcement and crime prevention. The remaining information must be released. *But see* discussion *supra* note 1.

We note that Exhibit B contains photographs of two police department officers using cellular telephones. Section 552.119 provides that

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from the requirements of Section 552.021 unless:

(1) the officer is under indictment or charged with an offense by information;

(2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

One of the pictures appears to be part of a newspaper article. If this is the case, section 552.119 does not apply to that picture. *See* Gov't Code § 552.007(b). The city must determine if the pictures contained in Exhibit B are subject to section 552.119 -- in which case they must be withheld from public disclosure.

Section 552.305 provides that in a case in which requested information involves a third party's privacy or property interests, a governmental body may decline to release the information for the purpose of requesting an attorney general decision. Gov't Code § 552.305(a). "A person whose interests may be involved under Subsection (a), or any other person, may submit in writing to the attorney general the person's reasons why the information should be withheld or released." *Id.* § 552.305(b). The governmental body may rely on the third party to establish that the information should be withheld under applicable Open Records Act exceptions. *Id.* § 552.305(c); Open Records Decision No. 542 (1990). The act does not require that this office raise and consider exceptions that have not been raised.

Pursuant to section 552.305(b) of the Government Code, this office notified Southwestern Bell Mobile Systems and MetroCel Cellular Telephone Company of the third party request for information from the city and offered each entity an opportunity to address the availability of the records relating to it.

McCaw Cellular Communications, Inc., ("MCCI") responded to this office informing us that MetroCel Cellular Telephone Company was an affiliate of MCCI. MCCI has no objection to the MetroCel documents being released to the requestor. Accordingly, this information must be released.

Southwestern Bell Mobile Systems ("SBMS") contends that the information submitted by SBMS is excepted under sections 552.104 and 552.110. We note that section 552.104 is designed to protect the interests of the governmental body as in a competitive bidding situation for a contract or benefit. Open Records Decision No. 592 (1991) at 8. It is not designed to protect the interests of private parties submitting information to a governmental body. *Id.* at 8-9. The city does not claim that any of the requested information is excepted from disclosure under section 552.104. Accordingly, the information is not excepted under section 552.104 of the Government Code.

Section 552.110 excepts "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The governmental body or the company whose records are at issue must make a prima facie case for exception as a trade secret under section 552.110. *See* Open Records Decision No. 552 (1990) at 5; *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); RESTATEMENT OF TORTS § 757 cmt. b (1939) (definition of trade secret and list of six factors to be considered when determining whether information is trade secret). SBMS does not demonstrate how or why the requested information constitutes a trade secret or commercial or financial information confidential by law. Accordingly, this information may not be withheld under section 552.110 of the Government Code. Except for the information marked by this office as excepted under section 552.108 or section 552.119, the information must be released in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'RWS', followed by a stylized flourish.

Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/LBC/rho

Ref: ID# 33426

Enclosures: Marked documents

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